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*Attorneys for Non-Party Officials of
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE TESLA, INC. SECURITIES
LITIGATION

Case No. 3:18-cv-04865-EMC

**MOTION TO QUASH RULE 45
SUBPOENAS OF NON-PARTY
OFFICIALS OF THE PUBLIC
INVESTMENT FUND OF THE
KINGDOM OF SAUDI ARABIA**

Judge: Honorable Edward M. Chen
Hearing: January 19, 2023
Time: 1:30 p.m.
Date Filed: August 10, 2018
Trial Date: January 17, 2023

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on January 19, 2023, at 1:30 p.m., or as soon as the matter
3 be heard, before the Honorable Edward M. Chen of the United States District Court, Northern
4 District of California at Courtroom 5 – 17th Floor, 450 Golden Gate Avenue, San Francisco,
5 California, Non-Parties His Excellency Yasir O. Al-Rumayyan, Mr. Turki Al-Nowaiser, Mr. Saad
6 Al Jarboa, and Mr. Naif Al Mogren (together, “Non-Parties”), each of whom is an official of the
7 Public Investment Fund of the Kingdom of Saudi Arabia (the “PIF”), will and do move this Court
8 for an order quashing Defendants’ Tesla, Inc., *et al.* (“Defendants”) Subpoenas to Appear and
9 Testify at a Hearing or Trial.

10 Non-Parties respectfully request that this Court quash the subpoenas for lack of jurisdiction
11 under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (“FSIA”) and common-law
12 immunity, lack of personal jurisdiction, and for failure to comply with the service requirements
13 under the FSIA and Federal Rule of Civil Procedure 45. By appearing to invoke their sovereign and
14 common-law immunity neither the PIF nor its officials waive their immunity and reserve all rights.

15 This Motion is based upon this notice of motion, supporting memorandum of points and
16 authorities, the Declaration of Kimberly A. Havlin (“Havlin Declaration”) and exhibits attached
17 thereto, and such evidence as may be requested or permitted by the Court.

18 Dated: January 12, 2023

19 By: /s/ Heather M. Burke
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Non-Parties His Excellency Yasir O. Al-Rumayyan, Mr. Turqi Al-Nowaiser, Mr. Saad Al Jarboa, and Mr. Naif Al Mogren (together, “Non-Parties”), each of whom is an official of the Public Investment Fund of the Kingdom of Saudi Arabia (the “PIF”), a sovereign agency or instrumentality of the Kingdom, respectfully submit this memorandum of law in support of their Motion to Quash the Subpoenas issued to them (filed at ECF 522-525 respectively, and together the “Subpoenas”). For the Court’s ease of reference, the Subpoenas are compiled and attached to the Havlin Declaration as Exhibit 1 (“Compiled Subpoenas”). Non-Parties appear only for the limited purpose of this motion and hereby reserve all of their rights, immunities, and defenses as well as those of the PIF.

PRELIMINARY STATEMENT

Just weeks before trial, Defendants purported to serve trial subpoenas on four officials of the Public Investment Fund of the Kingdom of Saudi Arabia, including its Governor. Defendants’ supposed “service” on these officials was simply leaving a copy of the papers with an office administrator of a U.S. subsidiary of the PIF in New York. As the Subpoenas and their service are patently deficient (frankly, frivolous) for a number of obvious reasons discussed below, undersigned counsel wrote to counsel for Defendants to demand their withdrawal. Defendants’ counsel responded that “there is no need to file a motion to quash because we will not be seeking to enforce the subpoenas. The witnesses can choose to appear voluntarily, or can choose not to.” In other words, even Defendants describe the Subpoenas as having no force or effect. Yet they have refused to withdraw them, necessitating this motion.

The Subpoenas should be quashed solely on the basis of Defendants’ concession that they need not be complied with. They are also legally deficient and should be quashed on multiple grounds. *First*, the PIF is a foreign state under the FSIA and thus is presumptively immune from this Court’s jurisdiction. Defendants do not (and cannot) allege that any exception to immunity applies. The PIF’s immunity also extends to preclude jurisdiction over its officials through common-law immunity. In addition, the Court also lacks personal jurisdiction over Non-Parties, as Defendants have not even attempted to assert an applicable basis for general or specific personal jurisdiction (nor could they). *Second*, enforcement of the Subpoenas as to Non-Parties—all officials

of a sovereign entity, the PIF—would violate principles of international comity. *Third*, the FSIA prescribes methods for service on foreign states and their agencies and instrumentalities, like the PIF, and Defendants did not comply with them. *Fourth*, service was also deficient under the basic principles of Rule 45, which requires personal service, and does not permit service on a U.S. subsidiary even for foreign corporations, let alone foreign persons like Non-Parties. And *fifth*, the Subpoenas acknowledge that Non-Parties are in the Kingdom of Saudi Arabia, obviously far more than 100 miles from this courthouse.

The Subpoenas should be quashed.

BACKGROUND

A. The Public Investment Fund

The PIF is the sovereign wealth fund of the Kingdom of Saudi Arabia. Established by Royal Decree in 1971, the PIF is an integral part of the Kingdom of Saudi Arabia. *See* the PIF’s Website, *Who We Are* (Havlin Decl., Exhibit 2). The PIF was established by statute (the “PIF Law”) and formed “for the purpose of serving the public interest; promoting economic development in the Kingdom and diversifying its sources of income; and maintaining the interest of future generations.” PIF Law (Havlin Decl., Exhibit 3), Art. 3. Today, the “PIF is the engine driving the transformation of [the Kingdom’s] economy” and plays an important role in the Kingdom’s national economic strategy. *See* the PIF’s Website, *Who We Are*.

The individuals subpoenaed include His Excellency Yasir O. Al-Rumayyan, the PIF’s Governor, and Mr. Turki Al-Nowaiser, the PIF’s Deputy Governor and Head of International Investments. *See* the PIF’s Website, *Our Leadership* (Havlin Decl., Exhibit 4). The Subpoenas purport to require Non-Parties to travel to San Francisco and appear before the Court for sworn testimony at the trial in this matter commencing on January 17, 2023.

Though the Subpoenas acknowledge on their face that these individuals are in the Kingdom of Saudi Arabia, they say they are “c/o” USSA International, a U.S. subsidiary of the PIF. *See* Compiled Subpoenas at 1. USSA International is a Delaware corporation with an office in New York City, and it is a separate and distinct legal entity from the PIF. *See* Delaware Division of Corporations Registry, Entity Details for USSA International LLC (Havlin Decl., Exhibit 5). The

1 Subpoenas were apparently dropped off with an office administrator at USSA International's offices
2 in New York City. *See* Compiled Subpoenas at 1.

3 On January 6, 2023, counsel for Non-Parties wrote to Defendants' counsel, outlining
4 numerous deficiencies in the Subpoenas and requesting that Defendants withdraw them. Non-
5 Parties' Ltr. to Defs. of January 6, 2023 (Havlin Decl., Exhibit 6). On January 9, Defendants'
6 counsel responded that "[t]here is no need to file a motion to quash because [Defendants] will not
7 be seeking to enforce the subpoenas. The witnesses can choose to appear voluntarily, or can choose
8 not to." (Havlin Decl., Exhibit 7). Counsel for Non-Parties responded the same day, asking
9 Defendants' counsel to properly withdraw the Subpoenas and note such withdrawal on the Court's
10 docket, where the Subpoenas had previously been filed. (Havlin Decl., Exhibit 8). As of the time
11 of filing, Non-Parties have not received a response, necessitating this motion.

12 ARGUMENT

13 Defendants' counsel has stated that the Subpoenas are of no force and effect and that Non-
14 Parties can "choose" whether or not to appear. That alone is reason to quash them. It is a misuse of
15 legal process for Defendants to leave in place and refuse to withdraw trial subpoenas that they have
16 stated need not be respected. The Subpoenas are also legally deficient for multiple reasons, as
17 outlined below.

18 **A. There Is No U.S. Court Jurisdiction Over Non-Parties**

19 Under the FSIA, foreign states and their instrumentalities are presumptively "immune from
20 the jurisdiction of the courts of the United States." 28 U.S.C. § 1604; *see also Peterson v. Islamic*
21 *Republic of Iran*, 627 F.3d 1117, 1127 (9th Cir. 2010) (explaining that "the FSIA was meant to
22 spare foreign states not only from liability on the merits but also from the cost and inconvenience of
23 trial"). An "agency or instrumentality" of a foreign state is (1) "a separate legal person, corporate or
24 otherwise"; (2) "an organ of a foreign state" or an entity "a majority of whose shares or other
25 ownership interest is owned by a foreign state"; and (3) "neither a citizen of a State of the United
26 States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(b).

27 As described above and in the accompanying declaration, the PIF is an integral part of the
28 Kingdom of Saudi Arabia and an agency or instrumentality of the Kingdom, within the meaning of

1 the FSIA. The PIF is legally separate from the Kingdom itself and was formed for a public purpose
 2 and supports the Kingdom in projects of national and strategic significance. *See* the PIF’s Website,
 3 *Who We Are*; PIF Law, Art. 3. The PIF is therefore presumptively immune from this Court’s
 4 jurisdiction under the FSIA. *See* 28 U.S.C. § 1604.

5 Given the PIF’s presumption of immunity, it can only be subject to U.S. process if the
 6 challenging party—Defendants here—meet their burden of showing that an exception to the FSIA
 7 applies. *Peterson*, 627 F.3d at 1124-25; 28 U.S.C. § 1605(a). Defendants made no such effort in
 8 the Subpoenas or the parties’ correspondence, nor could they. Indeed, the exceptions to immunity
 9 often invoked in this context—commercial activity and waiver—do not apply.

10 As to commercial activity, this exception applies only where “the action is based upon” the
 11 categories of conduct enumerated under 28 U.S.C. § 1605(a)(2), such that the enumerated conduct
 12 “constitutes the ‘gravamen’ of the suit.” *OBG Personenverkehr AG v. Sachs*, 577 U.S. 27, 35
 13 (2015). The U.S. Supreme Court has instructed that this inquiry requires that a court must “zero[]
 14 in on the core of the [] suit,” that is the “acts that allegedly injured the [plaintiffs],” and not alleged
 15 activities that merely “led to the conduct that eventually harmed” them. *OBG Personenverkehr*, 577
 16 U.S. at 33-34. The “gravamen” of the suit here are actions of Defendants that allegedly had
 17 repercussions for Tesla stockholders, not actions of Non-Parties. Indeed, it would be an anomalous
 18 result—and Non-Parties are not aware of any case—in which a suit was found to be “based upon” a
 19 non-party’s conduct for purposes of this inquiry.

20 As to waiver, this exception applies where the “foreign state has waived its immunity either
 21 explicitly or by implication.” 28 U.S.C. § 1605(a)(1). “The waiver exception is narrowly
 22 construed,” and courts rarely find that a [foreign state] has waived its sovereign immunity without
 23 *strong evidence* that this what the foreign state *intended*.” *Barapind v. Gov’t of the Republic of*
 24 *India*, 844 F.3d 824, 829 (9th Cir. 2016) (cleaned up). There has been no such waiver here, and
 25 Defendants have not and cannot identify any.

26 Given the sovereign status of the PIF, “common-law foreign sovereign immunity” extends
 27 to the Non-Party foreign officials “for ‘acts performed in their official capacity if the effect of
 28 exercising jurisdiction would be to enforce a rule of law against the state.’” *Dogan v. Barak*, 932

1 F.3 888, 893–94 (9th Cir. 2019) (quoting Restatement (2d) of Foreign Relations Law § 66(f)).
 2 Common-law foreign official immunity “operate[s] as immunity from suit, not simply immunity
 3 from liability,” and therefore shields Non-Parties from any enforcement of the Subpoenas by the
 4 Court. *Whatsapp Inc. v. NSO Grp. Techs. Ltd.*, 491 F. Supp. 3d 584, 591, 595 (N.D. Cal. 2020)
 5 (denying motion to compel and further noting that “[p]ermitting [a] case to proceed through
 6 discovery . . . would undermine the fundamental privilege of immunity from suit”); *see also Moriah*
 7 *v. Bank of China, Ltd.*, 107 F. Supp. 3d 272, 278-80 (S.D.N.Y. 2015) (denying a motion to compel
 8 testimony from a non-party former senior advisor to the Israeli government on basis of official
 9 immunity); *see also id.* at 277 (noting that although “[c]ase law involving immunity of non-party
 10 foreign official is scarce,” “immunity protects non-parties from compelled testimony because
 11 ‘sovereign immunity is an immunity from trial and the attendant burdens of litigation’”) (quoting
 12 *Giraldo v. Drummond Co., Inc.*, 808 F. Supp. 2d 247, 250-51 (D.D.C. 2011), *aff’d*, 493 F. App’x
 13 106 (D.C. Cir. 2012)). The Non-Parties are not aware of any case permitting application of a
 14 commercial activity exception to abrogate common-law foreign official immunity, and in any event,
 15 no such exception would apply here.

16 Furthermore, the Court lacks personal jurisdiction over Non-Parties. “[D]ue process
 17 necessitates that a nonresident [] have ‘certain minimum contacts’ with a forum state before the
 18 state can exercise personal jurisdiction over that individual or entity.” *LNS Enter. LLC v.*
 19 *Continental Motors, Inc.*, 22 F.4th 852, 858 (9th Cir. 2022). There is no basis to suggest that Non-
 20 Parties (or the PIF) are “at home” in California for purposes of general jurisdiction, and there also is
 21 no apparent basis for the Court to assert specific personal jurisdiction over Non-Parties. *See id.* at
 22 859 (stating that the “minimum contacts” test requires that (1) the non-resident party must
 23 purposefully direct his activities with the forum or purposely avail himself of the privilege of
 24 conducting activities in the forum; (2) the claim arises from or relates to the individual’s forum-
 25 related activities; and (3) the exercise of jurisdiction comports with fair play and substantial justice).
 26 In addition, as discussed *infra* §§ C, D, the lack of proper service of the subpoenas on Non-Parties
 27 deprives the Court of personal jurisdiction over Non-Parties as well. *See Cunningham v. Matrix*
 28 *Fin. Servs., LLC*, No. 8:20-mc-00065-CJC (JDE), 2020 U.S. Dist. LEXIS 205374, at *5 (C.D. Cal.

1 Nov. 3, 2020) (holding court lacked personal jurisdiction over non-party because non-party was not
2 properly served with subpoena).

3 **B. The Subpoenas Should Be Quashed Under Principles of Comity**

4 Separate from sovereign immunity, principles of international comity also require quashing
5 the Subpoenas. “[T]he demands of comity in suits involving foreign states, either as parties or as
6 sovereigns with a coordinate interest in the litigation,” require that U.S. courts “take care to
7 demonstrate due respect for any special problem confronted by the foreign litigant.” *Societe*
8 *Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 546 (1987); *see also*
9 *Champion v. Feld Ent., Inc.*, No. 20-cv-2400, 2022 U.S. Dist. LEXIS 99151, at *12 (S.D. Cal. June
10 2, 2022) (explaining that comity concerns seek to “curb ‘unnecessary’ discovery to foreign nonparty
11 litigants”). The Subpoenas purport to be a demand from this Court that Saudi government officials
12 travel to the United States, attend the trial in this case, and testify under oath when called. Such a
13 profound imposition on another state’s sovereignty would be hard to justify in any circumstance, let
14 alone one in which even the issuing party does not believe the subpoenas should be enforced.

15 Compelling Non-Parties to testify would also undermine the sovereign interests of the
16 Kingdom of Saudi Arabia. *See Richmark Corp. v. Timber Falling Cons.*, 959 F.2d 1468, 1476 (9th
17 Cir. 1992) (explaining that the “most important factor” in the comity analysis is the balance of
18 national interests). In particular, “while the United States” holds “a general interest in enforcing its
19 laws” an individual’s “non-party status mitigates against these interests.” *Tiffany (NJ) LLC v. Qi*
20 *Andrew*, 276 F.R.D. 143, 160 (S.D.N.Y. 2011). Here, requiring courtroom testimony from these
21 government employees of the PIF implicates confidential matters of state, the disclosure of which
22 would violate Saudi law. *See* PIF Law, Art. 17 (providing that the PIF’s employees “shall not
23 disclose any confidential information”). Saudi laws of evidence and civil service contain similar
24 prohibitions. *See, e.g.*, KSA Law of Evidence promulgated by Royal Decree No. M/43 dated
25 26/05/1443H (Dec. 30, 2021); KSA Code of Conduct Rules and the Ethics of the Public
26 Employment issued by Council of Ministries Resolution No. 555 dated 25/12/1437H (Sept. 28,
27 2016).

28 Accordingly, the Subpoenas should be quashed on comity grounds as well.

C. The Subpoenas Were Not Properly Served Under The FSIA

The PIF, as an “agency or instrumentality” within the meaning of the FSIA, must be served as specified in 28 U.S.C. § 1608(b). To the extent the Subpoenas seek for the PIF to produce the Non-Parties for testimony in their official capacity, the Subpoenas are deficient because they were not served on the PIF pursuant to any of the specific methods enumerated. Section 1608(b) governs service “upon an agency or instrumentality of a foreign state” and provides, in hierarchical order, four methods by which “[s]ervice . . . shall be made:”

(1) by “any special arrangement”; or

(2) “if no special arrangement exists, by delivery . . . to an office, a managing or general agent, or to any agent authorized by appoint or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents”; or

(3) “if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.”

It is clear from the face of the Subpoenas that Defendants did not follow any of the methods required under § 1608(b). Defendants left the Subpoenas with an office administrator of a subsidiary, USSA International. There has been no showing that USSA International is the PIF’s agent, and indeed it is not. Such service is non-compliant with the statutory mandate and ineffective, and Defendants’ failure to adhere to the FSIA’s mandatory service methods constitutes another independent basis to quash the Subpoenas.

D. Defendants Failed To Effect Proper Service Under Rule 45

The Subpoenas also fail to comply with basic service rules under Rule 45 of the Federal Rules of Civil Procedure. Rule 45 provides that “[s]erving a subpoena requires delivering a copy *to the named person.*” Fed. R. Civ. P. 45(b) (emphasis added). Defendants did not deliver a copy to

any of the Non-Parties, which is fatal. *See S.F. BART Dist. v. Spencer*, No. C 04-04632 SI, 2006 U.S. Dist. LEXIS 73140, at *3 (N.D. Cal. Sept. 25, 2006) (granting motion to quash subpoenas that were not personally served); *see also Dopson-Troutt v. Novartis Pharm. Corp.*, 295 F.R.D. 536, 537-38 (M.D. Fla. 2013) (service of subpoenas to testify at trial on two individuals was improper because service was made on their employer’s registered agent, rather than personal service on the individuals).

Indeed, Defendants’ attempted service was not even a delivery to the PIF (the entity with which Non-Parties are associated), but rather with a subsidiary of the PIF in New York. Courts have routinely rejected attempts to serve foreign corporations by serving their U.S. subsidiaries. *Fujikura Ltd. v. Finisar Corp.*, No. 15-mc-80110-HRL, 2015 U.S. Dist. LEXIS 135871, at *17-18 (N.D. Cal. May 14, 2015) (finding “unpersuasive” the argument that service of a Rule 45 subpoena on a foreign corporation’s subsidiary is sufficient); *Hake v. Citibank, N.A.*, No. 19-mc-00125, 2020 U.S. Dist. LEXIS 52782, at *24 (S.D.N.Y. Mar. 26, 2020) (“The service rules cannot be avoided by serving a domestic subsidiary of a foreign corporation.”). Individuals associated with the PIF are of course even farther removed.

E. The Subpoenas Violate Rule 45’s 100-Mile Limitation

Rule 45 provides that “[a] subpoena may command a person to attend a trial . . . at a place,” “within 100 miles of where the person resides, is employed, or regularly transacts business in person.” Fed. R. Civ. P. 45(c)(1)(A). The Subpoenas identify Non-Parties as officials of the PIF in the Kingdom of Saudi Arabia, yet purport to require them to travel to testify San Francisco. That is yet another basic deficiency supplying grounds to quash the Subpoenas. *See* Fed. R. Civ. P. 45(d)(3)(A)(ii) (“[T]he court for the district where compliance is required must quash or modify a subpoena” that “requires a person to comply beyond the geographical limits specified.”); *see also AngioScore, Inc. v. TriReme Med., Inc.*, No. 12-cv-3393, 2014, 2014 U.S. Dist. LEXIS 165227 (N.D. Cal. Nov. 25, 2014), at n.1 (holding that a subpoena was “invalid on its face” for violating the 100-mile limit set in Rule 45).

CONCLUSION

For the foregoing reasons, Non-Parties respectfully request that the Court grant their Motion and Quash the Subpoenas in their entirety.

Dated: January 12, 2023

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FILER'S ATTESTATION

Pursuant to Civil L.R. 5-1(i)(3), regarding signatures, I, Heather M. Burke, attest that concurrence in the filing of this document has been obtained.

Executed: January 12, 2023

/s/

Heather M. Burke

Heather M. Burke

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2023, the within document was filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to the attorneys of record in this case.

Executed: January 12, 2023

/s/

Heather M. Burke

Heather M. Burke